89-1218

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

BRENDA DOE, as next best friend of MICHELLE DOE, a minor,

Petitioner,

v.

BOOKER BOBBITT, SHIRLEY DUKES, DEVORAH ROBERTS, and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether caseworkers and supervisory employees of the Illinois Department of Children And Family Services who have been given temporary custody of a child by order of the Juvenile Court are entitled to qualified immunity from liability for injuries suffered by that child due to physical and sexual abuse by members of her foster family when those officials had reason to know prior to placement that the foster home would be an unsafe environment for the child?

LIST OF PARTIES

The parties to the proceedings before this Court are: Plaintiff-Petitioner, Michelle "Doe", and Defendant-Respondents Booker Bobbitt, Shirley Dukes, Devorah Roberts, and Barbara Ullman. At the time of the events complained of, Booker Bobbitt and Devorah Roberts were caseworkers employed by the Illinois Department of Children and Family Services (DCFS). Shirley Dukes and Barbara Ullman were supervisory-level employees of DCFS, in charge of the activities of Bobbitt and Roberts respectively.

The claims asserted below by Brenda Doe on her own behalf were dismissed prior to the judgment of the Seventh Circuit. They are not before this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michelle Doe, by her mother and next best friend Brenda Doe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court Of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on August 9, 1989.

OPINIONS BELOW

On November 4, 1988, The United States District Court for the Northern District of Illinois entered an Order and Memorandum Opinion denying Defendants' Motion To Dismiss on the issue of qualified immunity. *Doe v. Bobbitt*, 698 F.Supp.1415 (N.D.Ill. 1988) (A. 2) On appeal by the Defendants, a panel of the United States Court Of Appeals For The Seventh Circuit reversed the decision of the District Court in an opinion entered on August 9, 1989. *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989) (A. 11, 12) Rehearing was denied in an order entered on October 26, 1989. (A. 16)

JURISDICTIONAL STATEMENT

Jurisdiction of this action was originally premised on 28 U.S.C. Section 1343 (3) and 42 U.S.C. Section 1983.

The Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit was entered on August 9, 1989. The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Section 1254 (1). This petition for a writ of certiorari has been timely filed within 90 days of the entry of the Seventh Circuit's order denying rehearing on October 26, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section I.

42 U.S.C. Section 1983

STATEMENT OF THE CASE

On December 15, 1983, the Illinois Department of Children and Family Services (DCFS) assigned one of its caseworkers, Booker T. Bobbitt to investigate a complaint registered against Brenda Doe. The complaint, originating with the Northlake, Illinois Police Department, alleged that Brenda had physically abused her eleven-year-old daughter, Michelle, and her adopted son, Ronnie.

Bobbitt interviewed Brenda at her home on December 16, 1983. During the course of the interview, Brenda admitted that she had a history of alcohol abuse. She agreed that it might be best for the entire family if her children were placed in a DCFS foster home while she underwent treatment. Brenda, however, expressed concern about the children's placement, suggesting that the children would not be safe if they were to remain in the home of their aunt and uncle. Brenda contends that as early as this initial interview, she warned Bobbitt that members of her relatives' family abused alcohol and drugs, and that physical abuse occurred between family members on a frequent basis.

Bobbitt visited Michelle and Ronnie at the home of their aunt and uncle on December 18, 1983. In an interview lasting a total of one hour, Bobbitt spoke to the two children, their aunt, Margaret and one of the aunt's daughters, Regina. Bobbitt did not inspect the household, failed to ascertain what living and sleeping accommodations were available for Michelle and Ronnie, and did not determine how may rooms were in the home or how many persons already resided there.

At some time between Bobbitt's visit to the home of Michelle's aunt and uncle and the temporary custody hearing, Michelle's two adult male cousins, Daniel, age 22, and Ronald, age 20, began sexually abusing Michelle.

On December 21, 1983 a hearing was held in the Cook County Juvenile Court to determine a safe temporary placement for Michelle and Ronnie. Immediately prior to the hearing, Brenda and her attorney advised the State's Attorney, Guardian Ad Litem, and Booker Bobbitt that they would not contest DCFS taking temporary custody of the children, provided that the children be removed from the aunt's and uncle's home and placed in a "proper" foster care home. Brenda, with her attorney's concurrence, repeated her concerns over conditions in her relatives' home, and her concerns for the safety of her children. Michelle contends that just prior to the hearing, she as well approached Bobbitt and tearfully asked to be removed from her aunt's and uncle's home, although she did not express her reasons for wanting to leave.

During the course of the custody hearing, Brenda testified that physical abuse, alcohol abuse and drug abuse regularly occurred in her relatives' household. She

also testified that one of the male cousins had been arrested and referred to the juvenile authorities for sexual abuse of a young boy. Michelle's aunt admitted on cross-examination that her son had been arrested and sent to a youth camp for a month after being charged with having an affair with a boy.

The Court appointed Gary T. Morgan of DCFS as temporary custodian of Michelle and Ronnie. While the Court did not prohibit placement in the aunt's and uncle's home, he continued the matter for a social investigation of all the parties, and directed DCFS to investigate the home to see if there was any substance to the serious allegations which had been presented to him.

Neither Bobbitt, nor any other caseworker from DCFS conducted a further investigation of the aunt's and uncle's home. Bobbitt left the courthouse after the December 21 hearing without further conversation with Michelle, Brenda, or any other person concerning the placement. Michelle and Ronnie remained in their aunt and uncle's home. Bobbitt did not give the children an emergency phone number, or any other method of contacting him.

According to DCFS rules, Bobbitt was required to submit a Preliminary Report of Investigation (CANTS 2) within seven days after receipt of his Initial Oral Report. (CANTS 1) No action could be taken by any other caseworker until said report had been submitted. Although the CANTS 2 report was due on December 22, Bobbitt failed to submit it until December 27, effectively preventing any further investigation or protective services in Michelle's and Ronnie's interests for that period of time.

His report as finally submitted was silent as to the allegations made by Brenda at the Juvenile Court. Although DCFS policy mandates that no child be placed, temporarily or otherwise, in a home where a sex offender resides, Bobbitt advised no one that an accused sex offender lived in the home where Michelle and Ronnie had been placed. A follow-up caseworker was assigned to monitor the children only after Bobbitt's tardy and incomplete CANTS 2 report had been reviewed, approved, and forwarded by Bobbitt's supervisor, Shirley Dukes. Michelle had no contact whatsoever with any DCFS caseworker or other DCFS employee until December 30, 1983 at the earliest, and possibly not until early January.

During the period between the custody hearing and the first visit by the new caseworker, the sexual assaults upon Michelle continued. Both Daniel and Ronald were involved, subjecting Michelle and their sister, Margaret, to genital, oral and anal intercourse, and lewd fondling. Michelle's uncle kissed and fondled her in an inappropriate manner on other occasions during this period. Over a span of three weeks, Michelle was sexually assaulted by one or another of her relatives on at least fifteen separate occasions. In addition to the sexual abuse, Michelle's uncle and cousins gave Michelle and Margaret alcohol, marijuana and pills to consume on several occasions. Michelle complained of the sexual attacks to her aunt and to other adult members of the family, but no corrective or protective action was taken.

Michelle's file was assigned to Devorah Roberts, a newly hired, inexperienced caseworker as her first case. In her visits to Michelle at her relatives' home over the

course of one month, Roberts noted evidence of unsanitary and unsafe conditions, including cockroaches crawling on exposed food. The physical condition of the home was dilapidated, filthy and in disrepair. She observed and orally reported that the house was in a chaotic state. Roberts saw evidence that Michelle's uncle was chronically abusing alcohol, and observed bruises and other signs that Michelle was being abused physically. However, despite her observations, and Michelle's complaints that she was unhappy in her relatives' home, Roberts did nothing to alleviate Michelle's situation, although removing Michelle from the home was well within her discretion as a caseworker. Roberts did report her observations to her supervisor, Barbara Ullman, with a recommendation that Michelle be placed elsewhere.

Ullman was dissatisfied with the quality of Roberts's work and considered her incompetent. However, Ullman did not provide any additional training or supervision to Roberts to assist her in her handling of Michelle's situation, nor did she act on Roberts's reports of the obviously unsuitable conditions in the home. After a month of ignoring Roberts's observations, Ullman advised Roberts that the children would remain in the aunt's and uncle's home at least until the next scheduled court date, on February 23, 1984. Ullman finally told Roberts to quit or she would be fired. Roberts quit.

On multiple occasions during this period of time, Brenda contacted the DCFS caseworkers, including Roberts and Ullman to reiterate her fears for Michelle's safety. Brenda's repeated warnings were ignored as well.

On January 26, 1984, after Roberts quit, Michelle's case was assigned to yet another caseworker, Bruce Monroe. After approximately six visits with Michelle over the course of two weeks, Monroe exercised his professional discretion and had Michelle removed from her aunt's and uncle's home. Within days of being placed in a licensed foster home, Michelle admitted that she had been sexually abused by her uncle and cousins during the time she was living in their home. Her uncle and cousins were arrested.

In the Circuit Court of Cook County, Illinois, Criminal Division, Michelle's uncle and cousins pled guilty to various felony charges stemming from the sexual attacks on Michelle. Her uncle was put on probation. The cousins, Daniel and Ronald, were sent to prison.

Michelle brought this action for damages under 42 U.S.C. Section 1983, claiming that the various parties, by reason of their deliberate indifference to the Court's instruction to conduct an investigation, to Michelle and Brenda's repeated complaints and warnings, and to their own observations of unsafe and abusive conditions in her relatives' home, violated her rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The United States District Court, on November 4, 1988, held that Michelle's Second Amended Complaint (A. 17) stated a valid claim for relief. Relying on principles articulated in *Brooks v. Richardson*, 478 F.Supp 793 (S.D.N.Y 1979) and *Archie v. City of Racine*, 847 F.2d 1211, (7th Cir. 1988) (en banc) *cert. denied*, 109 S.Ct. 1338, the District Court held that Michelle had a right to be protected from the abuse she suffered while in State custody, and that the Defendants had violated that right

by placing her at risk of known dangers in the home of her relatives. The Court held as well that Michelle's rights in this respect were clearly established as of the time of the events in question, so that the Defendants were not entitled to qualified immunity for their actions.

The Defendants appealed the District Court's ruling on qualified immunity. (A. 10) On August 9, 1989, the Seventh Circuit, in a very brief opinion, (A. 12) reversed. Stating that "we cannot agree . . . that it was clearly established in 1984 that a public official who places a child at risk of harm from private individuals in a foster home violated that child's constitutional right", *Doe v. Bobbitt*, 881 F.2d 510 (7th Cir. 1989), the Seventh Circuit granted the Defendants immunity and dismissed Plaintiff's Complaint. Plaintiff's petition for rehearing was denied on October 26, 1989. (A. 16)

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Misapplied This Court's Prior Rulings in Awarding Qualified Immunity To The Defendants

This Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) articulated an objective standard of qualified immunity for government officials. Recognizing that conflicts often arise between the rights of individual citizens and the need to ensure "the vigorous exercise of official authority" by public officials engaged in the performance of discretionary duties, 457 U.S. at 806, the Court attempted to strike a balance

between the two by eliminating any inquiry into the subjective motivations of the officials involved. *Id.* at 817. Under *Harlow*'s standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 817. When an official could be expected to know that certain conduct was an abuse of his or her authority, or was otherwise unlawful, a person who suffered injury would be entitled to recover damages. *Id.* at 821.

The proper operation of the *Harlow* standard depends substantially on the level of generality at which the relevant legal rule is to be identified. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3038 (1987). While a general constitutional concept such as the guarantee of "due process of law" provides insufficient guidance to an official, it is equally unreasonable to require that the very action in question has been previously held unlawful. An official may be held liable for damages to an individual when the contours of the right the official is alleged to have violated is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." 107 S.Ct. at 3039. This requires only that "in light of preexisting law, the unlawfulness must be apparent". *Id.* at 3039.

In determining the objective reasonableness of an official's conduct, it is appropriate to take into account that official's training and his knowledge of the facts surrounding the act at issue. *E.g., Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1098 (1986). The official seeking

immunity may be required to demonstrate that he exercised reasonable professional judgment in choosing his course of action. Where the official's actions are completely outside his objectively expected range of competence, qualified immunity will not provide a shield. 106 S.Ct. at 1099.

Application of these standards to an official's conduct assures that the malicious, incompetent or irresponsible official must answer in court to those who have been damaged by his abusive or reckless exercise of power. And it is clear that insisting on an overly particularized delineation of the right at issue shifts the balance so far in favor of the government official that injustice will result. "When government officials abuse their offices, actions for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. *See also Anderson*, 107 S.Ct. 3040 (Court has been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise character of the particular right alleged to have been violated.) Individual citizens require recourse against governmental irresponsibility just as responsible public officials require a shield against the risk of frivolous lawsuits. *See Harlow*, 457 U.S. at 806, 821.

In its ruling on the issue of qualified immunity, the Seventh Circuit misapplied the applicable standard by imposing an impermissibly narrow characterization of the right which Michelle alleges her DCFS caseworkers violated. The Court, while acknowledging that "the very act in question need not have been held unlawful", *Doe*, 881 F.2d at 511, nonetheless defined the issue as "whether

in 1984 an official violated a clearly established constitutional right by placing a child in an environment despite information that individuals in that environment might present a threat to the child's safety". *Id.* By phrasing the right in question in such restrictive terms the Court was able to avoid considering substantial case law in analogous areas, holding that a person in the custody and control of state officials has the right not to be placed at risk of a known danger by those charged with her care.

Cases both in this court and in the federal circuits recognizing an affirmative right to protection in certain circumstances are not novel. Such a right was defined in the Seventh Circuit as early as 1974. In *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974), the Court held that where officials of a state mental hospital had notice that a patient had been the target of violent attacks by other patients on multiple occasions, and knew that the victim was unable to either defend himself or call for help, those officials could be held liable under 42 U.S.C Section 1983 for failing to take affirmative measures to protect him from future attacks. *Spence*, 507 F.2d at 557. Similarly, in *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1975) the Court held that the State, under its power of *parens patriae*, must provide humane care and treatment to both delinquent and non-delinquent juveniles in a medium security state home for boys. *Id.* at 360. *See also Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988), *cert denied*, 109 S.Ct. 1338 (1989) ("When the State puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk.")

The Supreme Court first explicitly recognized the State's affirmative duty to protect persons in its custody in 1976, in the prison context. The Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) held that prison officials could not act with deliberate indifference to the serious medical needs of prisoners without violating the Eighth Amendment ban on "cruel and unusual punishment" 429 U.S. at 104-5. The Court reasoned that by placing the prisoner in jail, the state had put him in a position where he was unable to provide for his own needs. This imposed on his custodians a duty to provide for the prisoner those necessary services which it had rendered him unable to provide for himself. *Id.* at 103.

In *Martinez v. State of California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980) the Court intimated that an affirmative right to protection under the Fourteenth Amendment could arise outside of the prison context, under conditions where state officials were aware that their actions caused an identifiable person to be placed at risk of harm from a third party. 444 U.S. 559. The determining factor was whether the officials were aware that the plaintiff, as distinguished from the public at large, faced a special danger as the result of the officials' actions. *Id.* Courts have read *Martinez* to imply a right to protection in a variety of circumstances. *See, e.g., Ellsworth v. City of Racine*, 774 F.2d 182, 187 (7th Cir. 1985) ("special relationship" sufficient to impose duty to protect existed between wife of police officer who had received threats and officers assigned to guard her; liability denied because officers merely were negligent rather than deliberately indifferent); *Jensen v. Conrad*, 747

F.2d 185, 194-5 (4th Cir. 1984) (factors which may establish a right to protection on the part of an individual include (1) whether the victim or perpetrator was in the legal custody of the state at the time of the incident; (2) whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and (3) whether the state knew of the claimant's plight); *Archie*, 847 F.2d at 1222 ("The state may take custody of a person, or propel him into danger without formal imprisonment or civil commitment.")

In 1982, the Supreme Court, in *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), recognized the right of persons committed to State hospitals to be entitled to some degree of protection from their State custodians – essentially the same right articulated by the Seventh Circuit in *Spence, supra*. *Youngberg* articulated for the first time an institutionalized mental patient's right to a certain minimum level of specialized training; but the *Youngberg* court also recognized the existence of a well established due process duty to provide reasonably safe living conditions and to otherwise make adequate provisions for the personal security of patients in state institutions. *See* discussion in *Garrett v. Rader*, 831 F.2d 202, 203 (10th Cir. 1987) *Youngberg* held that:

> "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause. *Ingraham v. Wright*, 430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401, 1413 (1977). . . .If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions."

457 U.S. at 315.

Prior to the events by which Michelle was injured, courts recognized as well that children have a right not to be placed at risk of danger through state action in a variety of contexts outside of penal or psychiatric institutions. In *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), the Seventh Circuit reinstated a complaint asserting a right to protection under the Fourteenth Amendment on behalf of three minor children. The complaint alleged that the police had arrested the sole adult occupant of an automobile, leaving the children without protection or supervision on a limited access Chicago superhighway. Both the arresting officers and department personnel later contacted by telephone refused to aid the children in any way, despite repeated pleas by the arrestee, the children's parents, and the children themselves. The Court held that:

> "[T]he children in the car had a federally protected right to be free from unjustified intrusions on their personal security by the police. Their personal security was under the protection of their uncle. If that protection was removed and no alternative protection was provided, they would be exposed to danger. . . . Arresting the uncle and yet leaving the children exposed to these hazards was an unjustifiable intrusion on the children's personal security."

Id. at 618.

The affirmative rights of children in foster care had been recognized as well by the Second Circuit. In *Brooks v. Richardson*, 478 F.Supp.793 (S.D.N.Y. 1979), the District Court allowed a mother and her two children to assert claims arising under the Fourteenth amendment's guarantee of Due Process and under 42 U.S.C. Section 1983 for

injuries arising from physical and sexual abuse of the children while the children were in the temporary custody of the Brooklyn Home For Children. The Court stated that:

> "A child who is in the custody of the State and placed in foster care has a constitutional right to at least humane custodial care. The New York Family Court sought to protect this interest when it removed the children from the Plaintiff's care. It would be ludicrous if the state- . . . could perpetrate the same evil the Family Court sought to prevent."

Id. at 795-6. The same type of Fourteenth Amendment analysis was applied by the Court of Appeals to uphold claims of children who suffered abuse in a private foster care home, in *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir.1981), *cert. denied* 464 U.S. 864 (1983) (holding that government officials responsible for placing children in an abusive foster home may be held liable if they displayed "deliberate indifference" to the child's welfare.)

As made apparent in the above discussion, a substantial body of analogous law establishing an affirmative right to protection for persons in state custody or otherwise placed at risk of harm by the acts of a state official existed at the time Michelle was placed in her relatives' home. This right had been interpreted to include, among other situations, the right of a child to be protected from abuse when removed from the custody of her natural parents by a state agency and placed in a foster care home. Contrary to the Seventh Circuit's assertion, *see Doe v. Bobbitt*, 881 F.2d at 511, a "substantial consensus" had

been reached that when the state has been given responsibility for a person's care and custody, a state official may not act with deliberate indifference to that person's safety by placing her at risk of known dangers. Under the rules articulated in *Harlow, Anderson*, and *Malley, supra*, a reasonable, well trained official in the defendants' position would have had more than sufficient notice that ignoring a court directive to investigate allegations as serious as those raised by Brenda Doe would place Michelle at risk of harm at least as grave as the circumstances which prompted DCFS to remove Michelle from her mother's care initially. Further ignoring Brenda's repeated warnings, Michelle's own complaints, and the evidence of alcohol abuse, drug abuse, physical abuse, and unsafe, unsanitary conditions which the defendants themselves observed in the home of Michelle's aunt and uncle demonstrates the deliberate indifference and failure to exercise reasonable professional judgment which has long been considered sufficient to establish a claim under the Fourteenth Amendment. Upon the facts as alleged, and under this Court's established precedents, these defendants cannot be entitled to qualified immunity for their actions.

II.

The Seventh Circuit's Decision Awarding Qualified Immunity To The Defendants Conflicts With Decisions Of Several Other Federal Circuits

In *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989) this Court stated:

> "Had the State by the affirmative exercise of its power removed Joshua from free society and

> placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. . . .We express no view on the validity of this analogy, as it is not before us in the present case."

109 S.Ct. at 1006. Several federal courts across the various circuits have recently rendered decisions which fall into the area left open by *DeShaney*. A number of those cases have refused to grant qualified immunity to officials responsible for placing or maintaining a child in an abusive environment, and thus are in direct conflict with the Seventh Circuit's decision in *Doe*.

The Second Circuit has long recognized that children who have been removed from their parents' care and placed in the temporary or permanent custody of a State agency have a right to at least humane custodial care, including the right to be protected from abuse. *Brooks v. Richardson*, 478 F.Supp at 795. *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) established that state officials charged with custody of a child may be held liable for failure to perform their protective function if they displayed an attitude of "deliberate indifference" to the child's welfare while she was in their custody, even if the child had been placed in a private family home for foster care. Such deliberate indifference could be established through repeated acts of negligence or a "pervasive pattern" of inattention to duty. *Id.* at 141-146. Conduct of child-care workers and/or agencies has been found actionable where caseworkers failed to investigate or remove a child from a foster home despite evidence of physical and sexual abuse. *Id.* Injunctive

relief was found appropriate as well where an agency, rather than finding suitable, long-term foster care arrangements for children in its custody, subjected those children to repeated "overnight placements" in temporary facilities. *Doe v. New York City Department of Social Services*, 670 F.Supp. 1145 (S.D.N.Y. 1987).

The Eleventh Circuit in *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (en banc) *cert denied*, 109 S.Ct. 1337 (1989) followed the Second Circuit in holding that a child in foster care may bring suit under 42 U.S.C. Section 1983 where state officials were deliberately indifferent to the child's welfare. The child, who suffered severe abuse after being taken from her mother in 1982 and placed in a foster home, had alleged that state officials had violated her rights in failing to investigate the home or her foster parents' fitness as custodians, and thereafter failing to supervise the care she received. Drawing an analogy to the protection afforded to incarcerated adults, the Court stated

> "The fourteenth amendment, like the eighth amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958). With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds."

Id. at 797.

The Ninth Circuit, as well, has recognized that the State has affirmative Constitutional duties toward foster

care children. The State's duties, triggered by its act of removing the children from their parents' custody and placing them in foster care programs, include, *inter alia*, ultimate responsibility for the children's welfare. Protecting the children from abuse by their foster parents is an integral part of that responsibility. *Lipscomb by and through DeFehr v. Simmons*, 884 F.2d 1242, 1246-7 (9th Cir. 1989). *But see Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989) (petition for certiorari pending) (according absolute, quasi-prosecutorial immunity to caseworkers who execute court order for seizure and placement of children in foster care).

In *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert denied*, 109 S.Ct. 816 (1989), the Fourth Circuit refused to grant defendant caseworkers and supervisors qualified immunity from damage claims brought on behalf of foster children victimized by physical, sexual and medical neglect while in the custody of the Baltimore City Department of Social Services. Citing *Martinez*, 444 U.S. at 285, *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983), and *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1985) the court held that at least after 1980, the date of the *Martinez* decision:

> "[T]here existed a constitutional right to protection on the part of children in state custody or having a 'special relationship' with the state, even out of the prison context, so that defendants could reasonably have expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them could constitute a violation of plaintiffs' Fourteenth Amendment rights."

L.J., 883 F.2d at 122. (holding as well that, prior to 1980, Title IV-A of the Social Security Act, 42 U.S.C. Section 608 and its successor acts clearly established the children's right to a safe foster care environment.)

Other Courts have recognized a clearly established right to protection on behalf of children in an even less pervasively controlled environment, that of the public schools. In *Doe "A" v. Special School District of St. Louis County*, 637 F.Supp. 1138 (E.D.Mo. 1986), nine handicapped children brought suit under 42 U.S.C. Section 1983 against the School District, school administrators, and a school bus driver, alleging that over a period of time between September 1983 and February 1985, defendants had deprived them of their Fourteenth Amendment rights by beating and sexually abusing them, or by failing to investigate or act on their complaints of abuse. In upholding the children's complaint, the Court stated "this Court does not doubt that the constitutional rights of children to be free from harm is commensurate with the rights of adults in State custody." *Id.* at 1145. Both the bus driver's affirmative acts of abuse, and the administrators' "tolerance" of those acts through their failure to act on the complaints of the children and their parents were found to "shock the conscience" of the Court. *Id.*

The Third Circuit also refused to grant immunity to school officials in two related cases dealing with sexual abuse of students by a teacher. *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Cir. 1989) and *Sowers v. Bradford Area School District*, 694 F.Supp. 125 (W.D.Penn. 1988), *affirmed* 869 F.2d 591 (3rd Cir. 1988), *vacated and remanded*, 109 S.Ct. 1634, *affirmed on remand*, 887 F.2d 262 (3rd Cir. 1989). In each case immunity was denied to

school officials who, over the course of six to eight years, between 1977 and 1985, allegedly failed to investigate multiple complaints of sexual abuse of female students by at least two teachers, actively covered up certain complaints of faculty misconduct, and harassed students who accused the teachers of assaulting them. The teachers involved finally were arrested and convicted. *See Stoneking*, 882 F.2d at 722; *Sowers*, 694 F.Supp. at 127-8. On the question of qualified immunity, the *Stoneking* court, relying in large part on *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413 (1977) stated that it seemed "ludicrous" to require consideration of whether it was "clearly established" that students had a right to be free from sexual abuse by faculty members. 832 F.2d at 726. "Reasonable officials", the court concluded, "would have understood the contours of a student's right to bodily integrity under the Due Process Clause to encompass a student's right to be free from sexual assaults by his or her teachers." *Id.* at 727. The *Sowers* court, following a line of reasoning more similar to *Doe "A"* and *White v. Rochford, supra*, also concluded that "a reasonable person would have been aware [during the 1979-80 school year and thereafter] that the plaintiff had a right to be free from intrusions into her personal privacy and bodily integrity." 694 F.Supp. at 140.

Petitioner submits that the Seventh Circuit has misread the rule of *DeShaney* to mean that no child has an affirmative right to protection under any circumstances, whether she is in the custody of her natural parents, or in the custody of or under the control of State officials. *DeShaney* did not, however, decide that question. Rather the Court expressly left the issue undecided, 109 S.Ct.

1006. By contrast with *Doe v. Bobbitt*, all of the above cited cases, in considering the territory *DeShaney* left open, either (1) recognize that a right to protection from abuse was clearly established at some time between 1977 and 1983 for foster children and/or public school children while in the actual or functional control of state officials, or (2) refuse to grant state officials immunity for acts which took place between 1977 and 1983 and which show deliberate indifference to the safety and physical integrity of children in their care. *Doe v. Bobbitt* stands as a confusing precedent, which offers little in the way of clear guidance on a disturbing legal issue. In addition, *Doe* evidences a marked division in opinion between the Seventh Circuit and the prevailing trend. Certiorari should be granted in order to resolve this conflict.

CONCLUSION

For all the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Brenda DOE, in her own proper person and as next best friend of Michelle Doe, Plaintiff,

v.

Booker BOBBITT, Shirley A. Dukes, Devorah Roberts, and Barbara Ullman, Individually and as employees of the Illinois Department of Children and Family Services, Defendants.

No. 85 C 7104.

United States District Court, N.D. Illinois, E.D.

Nov. 4, 1988.

Mother and daughter brought civil rights action against Illinois Department of Children and Family Services' employees, alleging wrongful acts and improper placement of daughter caused daughter to suffer physical and sexual abuse at hands of her relatives, under civil rights statute, and asserting claims for battery and intentional infliction of emotional distress. On employees' motions to dismiss, the District Court, Brian Barnett Duff, J., held that: (1) stay of discovery did not extend limitations period for mother's claims as to DCFS employees who allegedly violated mother's constitutional rights by failing to heed warnings of mother or daughter, but did extend limitations period as to mother's claims against supervisor; (2) mother's claim that DCFS employees denied her due process by ignoring her warnings that daughter's placement home was dangerous did not state cause of action; (3) DCFS employees were not entitled to qualified immunity from damage liability in § 1983 civil rights action brought by daughter alleging as result of wrongful acts by employees and improper placement

daughter suffered physical and sexual abuse at hands of her relatives; but (4) DCFS employees had absolute immunity in action brought by daughter for battery and intentional infliction of emotional distress.

Motions granted in part and denied in part.

John P. DeRose, Chicago, Ill., for plaintiff.

Paula Giroux, Illinois Atty. Generals' Office, Chicago, Ill., for defendants.

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

This is the second round of motions to dismiss this case involving the alleged wrongful acts of certain employees of the Illinois Department of Children and Family Services ("DCFS"). Brenda and Michelle Doe assert that as a result of these acts, Michelle Doe suffered physical and sexual abuse at the hands of her relatives. The DCFS employees have moved to dismiss the Does' Second Amended Complaint on a variety of grounds; their thrust is that the Does have not stated claims upon which this court can grant relief.

The facts of this case are essentially the same as those outlined in this court's earlier opinion. See *Doe v. Bobbitt*, 655 F.Supp. 691 (N.D.Ill.1987). The Does' Second Amended Complaint differs from their original complaint in many ways, principally in the addition of DCFS employees Devorah Roberts, Barbara Ullman, and Shirley

Dukes.[1] The Does have also pared their claims to three: Count 1, a claim under 42 U.S.C. § 1983 (1982) to redress violations of the Does' constitutional rights; Count 2, a claim under Illinois law for battery; and Count 3, a claim under Illinois law for intentional infliction of emotional distress.

Roberts, Ullman, and Dukes assert that the statue of limitations bars all three of these claims. Section 1983 does not contain a limitation on actions, but the Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 275-79, 105 S.Ct. 1938, 1946-48, 85 L.Ed.2d 254 (1985), determined that the federal district courts should borrow the limitations period for personal injury actions set by the state in which the court sits. Since *Wilson* created problems regarding its retroactive application, the Seventh Circuit construed *Wilson* in cases where a federal court must borrow Illinois law as barring all § 1983 claims filed within the shorter period of either five years of the accrual of the cause of action or two years after *Wilson* was decided, if the cause of action accrued prior to *Wilson*. See *Anton v. Lehpamer*, 787 F.2d 1141, 1146 (7th Cir.1986). Roberts, Ullman, and Dukes assert that Michelle's injuries occurred in February 1984, prior to *Wilson*. They contend that *Anton* thus dictates that the Does had to file their Second Amended Complaint prior to April 17, 1987 – two years after the decision in *Wilson*. The Does filed their Second Amended Complaint on September 6, 1988.

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[1] The Does voluntarily dismissed their claims against Leonard Goodman and Cook County on October 25, 1988, and against Gary Morgan on October 31, 1988.

This argument contains a few flaws. First, under Ill.Rev.Stat. ch. 110, ¶13-211 (1983), Illinois' two-year limitation for personal injury claims contained in *id.*, ¶13-202, does not apply to Michelle, since she is presently 15 years of age. Paragraph 13-202 bars some of Brenda's claims, however. Brenda argues that this court should relate her claims against Roberts, Ullman, and Dukes back in time to her original complaint, under the provisions of Rule 15(c), Fed.R.Civ.P. She contends that her claims against Roberts, Ullman, and Dukes arose out of the same transaction described in her original complaint, and that her naming of "Unknown Employees of the Department of Children and Family Services" in that complaint, see *Doe*, 665 F.Supp. at 691, notified Roberts, Ullman, and Dukes of her claims against them. The Seventh Circuit has held, however, that such pleading does not constitute proper notice under Rule 15(c), and that, moreover, Rule 15(c) is available only to those who demonstrate their failure to include a party stemmed from a mistake in identity. See *Wood v. Worachek*, 618 F.2d 1225, 1229-30 (7th Cir.1980).

Brenda makes one additional argument, however, that will enable her to save one of her claims from the statute of limitations. Brenda and Michelle filed their original complaint in this matter on August 14, 1985. They filed their first amended complaint on January 22, 1986. The two DCFS employees named in the suit at that time, Gary Morgan and Booker Bobbitt, moved to dismiss this complaint on March 4, 1986, and obtained a stay of discovery pending this court's ruling on their motion. Morgan and Bobbitt were represented by Assistant Illinois Attorney General Paula Giroux.

This court ruled on some of the issues presented in the motions to dismiss on July 30, 1987. See *Doe* 665 F.Supp. at 691. The Does moved to commence discovery in October 1987, but at the urging of the defendants this court denied the Does' motion on November 5, 1987, pending the court's ruling on matters left unresolved in its July decision. This court completed its consideration of the motions to dismiss on March 23, 1988. See *Doe v. Bobbitt*, 682 F.Supp. 388 (N.D.Ill.1988). The Does then began discovery, which they claim led to the addition of Roberts, Ullman, and Dukes in their Second Amended Complaint.

Brenda Doe submits that because Morgan and Bobbitt obtained a stay that prevented discovery of facts that implicated Roberts, Ullman, and Dukes – their colleagues at DCFS – this court should tack the period the stay was in effect to the limitations period. Such a move would extend the filing deadline of April 17, 1987 by nearly two years, and thus preserve Brenda's § 1983 claims against Roberts, Ullman, and Dukes from the statute of limitations. This argument suffers, however, from a few factual defects. According to the Second Amended Complaint, Roberts and Ullman violated Brenda's constitutional rights by failing to heed Brenda or Michelle's warnings. See Second Amended Complaint, ¶¶19, 23, 44(e)-(f). Brenda did not need to engage in discovery to sue Roberts or Ullman within the limitations period, since she knew she had spoken to them. Even if Brenda did not know to whom she spoke, she could have alleged enough facts (telephone numbers, dates, and the like) to have notified Roberts and Ullman that she would name them in this suit eventually.

Not so for Dukes. Brenda's charges against Dukes stem from Dukes's role as Bobbitt's supervisor. See *id.* at ¶¶37(b), 37(f), 37(h), 40. Brenda would not have known the identity of Bobbitt's supervisor or her role in this matter without discovery, and thus this court must respond to Brenda's request to extend the limitations period by the length of the period of the stay of discovery. Under Illinois law, a statute of limitations runs unless another statute provides for tolling. See *Ill. Bell Telephone Co. v. Allphin*, 60 Ill.2d 350, 356, 326 N.E.2d 737, 741 (1975). The only Illinois common-law exception to this is the discovery rule, which will not aid Brenda in this case. See *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 414-17, 58 Ill.Dec. 725, 728-29, 430 N.E.2d 976, 979-80 (1981) (discovery rule postpones the starting of the period of limitations "until the injured party knows or should have known of his injury"); *Hames v. Northern Illinois Gas Co.*, 70 Ill.App.3d 628, 629, 27 Ill.Dec. 164, 165, 388 N.E.2d 1127, 1128 (1979) (discovery rule does not extend to situations "where the undetermined fact is not the existence of the injury, but rather the identity of the tortfeas[o]r").

If Brenda wishes to preserve her claims against Dukes from the statute of limitations, she must do so with the help of another statute. One such statute is Ill.Rev.Stat. ch. 110, ¶ 13-216, which provides:

"When the commencement of an action is stayed by injunction, order of a court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." This statute will save Brenda's claims against Dukes from the Illinois statute of limitations. Admittedly, this court's stay of discovery in and of itself did not

prevent Brenda from filing any claim against Dukes. When coupled with Rule 11, Fed.R.Civ.P., however, the stay worked to prohibit such a filing. Rule 11 requires the signer of every pleading to certify "that to the best of the signer's knowledge, information, and belief found after reasonable inquiry it is well grounded in fact. . . ." Had Brenda filed a complaint against Dukes on a mere hunch, Dukes (through her attorney Giroux, who is the same attorney who helped the other DCFS defendants obtain the stay of discovery in this case) could have moved for sanctions under Rule 11. Caught between a statute of limitations and Rule 11, Brenda properly waited until this court lifted the stay of discovery, discovered facts implicating Dukes, then amended her complaint.

This court thus holds that while the statute of limitations bars Brenda's claims against Roberts and Ullman, it does not bar her claims against Dukes. Dukes thus joins Bobbitt in asserting that Brenda has stated no claims under the Due Process Clause of the Fourteenth Amendment and the Ninth Amendment to the Constitution. Brenda does not dispute the defendants' observation about her Ninth Amendment claim, but she insists that the defendants denied her due process by ignoring her warnings that Michelle's placement home was dangerous. Under the Due Process Clause, however, Brenda's interest in Michelle's placement gave her a right only to "fundamentally fair procedures." See *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 1394-95, 71 L.Ed.2d 599 (1982). According to *Santosky*, a state's chosen procedures are "fundamentally fair" when they achieve a proper balance among the private interests affected by the proceeding, the risks of error from a state's chosen procedure, and the

counter-vailing governmental interests supporting use of the procedure.

The problem with assessing Brenda's due process claim is that she never indicates which of DCFS's procedures were not fundamentally fair. In one sense, Brenda's allegations regarding Bobbitt and Dukes's insensitivity to her pleas amount to claims that she did not receive the benefit of fundamentally fair procedures – that in spite of what Brenda was supposed to get in the way of procedures, these defendants deprived her of them. This court interprets *Santosky*, however, as requiring parents to cast their claims of a denial of due process in the state's taking of their children in terms of defective procedures. This court cannot sit as a court of errors for DCFS, correcting every flaw in that agency's poor placements. The court can correct, however, fundamental defects in DCFS's procedures. This court of course cannot do this until Brenda indicates which procedures need improvement. For this reason, this court must reject Brenda's due process claims as she currently states them.

The defendants next challenge all of the Does' claims that they denied the Does equal protection of the laws, in violation of the Fourteenth Amendment. As the Seventh Circuit noted in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir.1982), "the guarantee of equal protection of the laws is not a source of substantive rights, 'but rather a right to be free from invidious discrimination in statutory classification and other governmental activity.' " *Id.* at 1103, quoting *Harris v. McCrae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). The defendants have asked the Does to specify what invidious discrimination occurred in this case, but the Does refuse to present

anything beyond what they have alleged in their complaint. This court cannot find anything in the Second Amended Complaint that it easily describes as discrimination, and so it will dismiss the Does' equal protection claims.

All of this leaves the court with Michelle's § 1983 and battery claims, as well as the Does' claims for intentional infliction of emotional distress. The defendants assert that they have qualified immunity from damage liability stemming from the first of these claims, Michelle's § 1983 action. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 2736-39, 73 L.Ed.2d 396 (1982) (government officials who perform discretionary functions generally shielded from civil damages liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). They say that they have such immunity since Michelle did not have a clearly established constitutional right to be free of the abuse she is alleged to have suffered. Michelle cites *Brooks v. Richardson*, 478 F.Supp. 793 (S.D.N.Y. 1979) – a case that the defendants do not question[2] – for the proposition that she had such a right.

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[2] They do make one remark, calling *Brooks* a case "of considerable vintage." Considering that *Brooks* is a 1979 case, the court can only wonder how the defendants feel about *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 2 L.Ed. 60 (1803); *M'Culloch v. State of Maryland*, 17 U.S. (4 wheat.) 316, 4 L.Ed. 579 (1819), *Gibbons v. Ogden*, 22 U.S. (9 wheat.) 1, 6 L.Ed. 23 (1824); *Slaughter-House Cases*, 83 U.S. (16 wall.) 36, 21 L.Ed. 394 (1873); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 788,

(Continued on following page)

The defendants suggest, however, that *Donald v. Polk County*, 836 F.2d 376 (7th Cir.1988), and *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir.1987), cert. granted, ___ U.S. ___, 108 S.Ct. 1218, 99 L.Ed.2d 419 (1988), are directly contrary to *Brooks*, such that not only was there doubt as to whether Michelle had such a right, she plainly has no right at all.

Neither of the cases which defendants cite controls this case or overrules *Brooks*. In *Donald*, the Donald family sued several state and county welfare and law enforcement agencies for having removed Dana Donald from the Donald home, and improperly investigating charges that Dana had been physically abused. The Donalds contended that these actions violated the state's obligation to provide social services to them, according to a state statute. The Seventh Circuit upheld the decision of the district court, however, that the violation alleged by the

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82 L.Ed. 1234 (1938); *Youngstown Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to name a few cases.

The defendant's argument regarding *Brooks'* age is specious. The Does make a good faith effort to demonstrate that Michelle had a clearly established right to have the state protect her from the abuse that she allegedly suffered. If they had cited a 1984 case relating to abuse children in the custody of the state, the defendants surely would have argued that the case was too recent to have made such a right "clearly established." Here they argue that a 1979 case was too old. This court will not allow the defendants to prevail this controversy by means of a Catch-22.

Donalds did not amount to a federal constitutional violation. While the Does have alleged, as did the Donalds, that the defendants violated state law, the Does have done more than this: they contend that the defendants directly deprived Michelle of her liberty without due process of law, as described in *Brooks*. The theory of *Brooks* was not that a state violates the Fourteenth Amendment by disobeying its own statutes, but rather that those "in the custody of the state and placed in foster care [have] a constitutional right to at least humane custodial care." *Brooks*, 478 F.Supp. at 795.

DeShaney is closer to this case, in that it involved an action by the guardian ad litem and the mother of Joshua DeShaney against Winnebago County, its Department of Social Services ("DSS"), and two DSS employees on the theory that they had directly violated Joshua's Fourteenth Amendment rights. Joshua's representatives contended that DSS was aware that Joshua's father, who had custody of Joshua, had abused him. DSS had taken temporary custody of Joshua and had investigated the charges, but had decided there was insufficient evidence of child abuse to retain custody. DSS thus returned Joshua to his father. A DSS caseworker regularly visited the DeShaney household thereafter, but did not investigate matters with enough vigor to discover that the abuse of Joshua was continuing. Eventually, Joshua's father beat Joshua so severely that he critically injured Joshua's brain. Wisconsin subsequently convicted Joshua's father of child abuse and sent him to prison.

Joshua's representatives charged that Winnebago County's conduct violated Joshua's Fourteenth Amendment rights in two ways. They contended first that DSS

deprived Joshua of the right to be protected from his father's abuse. The Seventh Circuit rejected this theory, citing the "well established" circuit rule that a state's "failure to protect people from private violence, or other mishaps not attributable to the conduct of its employees, is not a deprivation of constitutionally protected property or liberty." *DeShaney*, 812 F.2d at 301.

The second theory proposed by Joshua's representatives was that DSS shared responsibility with Joshua's father for depriving Joshua of his right to bodily integrity. The Seventh Circuit dismissed this theory too, on grounds of insufficient causation. The lack of causation, the court held, "can be seen most clearly by asking whether, if [DSS] had never existed, Joshua would have sustained the injuries for which he is seeking damages in this suit. The answer, almost certainly, is 'yes' " The court analogized DSS's actions to a "botched rescue attempt," but refused to extend the common law's rules regarding rescuer liability to cover constitutional torts. In doing so, the court rejected the holding of *Estate of Bailey by Dare v. County of York*, 768 F.2d 503, 510-11 (3d Cir.1985), which decided that a special relationship – one with accompanying constitutional duties – exists between the state and a child once the state is aware of a danger that a particular child may be abused. *DeShaney*, 812 F.2d at 302-03.

This court does not need to follow *Estate of Bailey* or disregard *DeShaney* in order to find the defendants liable in this case. This is clear by the answer to the question put forth by the Seventh Circuit in *DeShaney*: if DCFS had never existed, Michelle almost certainly would never have sustained the abuse that she suffered. It took the intervention of DCFS to remove Michelle from her

mother and place her with her abusive relatives. This action, and not the mere notice to DCFS that Michelle was in danger of abuse from her relatives, created the special relationship between DCFS and Michelle that will make the defendants liable to Michelle if she can establish the facts she alleges in the Second Amended Complaint. As the Seventh Circuit commented in *Archie v. City of Racine*, 847 F.2d 1211, 1222-23 (7th Cir.1988), "if the government hurls a person into a snake pit it may not disclaim responsibility for his safety."

This court thus holds, that, not only can Michelle sue the defendants under § 1983 for her injuries, the right that she claims was clearly established in 1984. See *Brooks*, 478 F.Supp. at 795 and cases cited therein. The defendants thus have no qualified immunity from any civil damages liability that may result from Michelle's § 1983 claims. They do have absolute immunity, however, from damages stemming from the acts alleged in Counts 2-3. Illinois grants public officials immunity from damages liability for acts falling within their official discretion. See *Mora v. State*, 68 Ill.2d 223, 12 Ill.Dec. 161, 369 N.E.2d 868 (1977). In *Midamerica Trust Co. v. Moffat*, 158 Ill.App.3d 372, 375 110 Ill.Dec. 787, 791, 511 N.E.2d 964, 968 (1987), the court held that DCFS officials act within their official discretion in making decisions relating to the placement of minors within DCFS custody. The Does claim that the defendants' acts were ministerial, but they make no attempt to

distinguish the contrary holding in *Moffat*. This court thus dismisses Counts 2-3 in their entirety.[3]

In summary, this court dismisses Brenda Doe's claims against Devorah Roberts and Barbara Ullman, as they are barred by the Illinois statute of limitations. The court also dismisses Brenda's claims against Booker Bobbitt and Shirley Dukes for various other failures to state a claim upon which relief can be granted. The court dismisses Michelle Doe's claims in counts 2-3 against all of the defendants on grounds that each is absolutely immune from liability, and dismisses her count for denial of equal protection on grounds that it does not state a claim upon which relief can be granted. All other motions to dismiss are denied.

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[3] Even if the defendants had no immunity, this court would find it difficult to hold the defendants liable under Counts 2-3. Count 2 claims that the defendants are responsible for aiding and abetting the battering of Michelle, but the Does leave not pleaded a necessary element of liability for those who aid and abet: incitement or acts in furtherance of a common plan with the assailant. See *Sklan v. Smolla*, 95 Ill.App.3d 658, 51 Ill.Dec. 161, 420 N.E.2d 575 (1981). The Does contend that this court can hold the defendants liable for the actions of Michelle's relatives in Counts 2-3 because the relatives were agents of DCFS. A principal is liable under Illinois law for the acts of his or her agent, however, only if the agent commits the act under the authority or direction of the principal. See *Carlberg v. Spiegels House Furnishing Co.*, 178 Ill.App. 424 (1913). When the agent abandons the business of the agency and performs an act outside of the scope of his authority in a wanton, willful, or malicious manner, the principal is not liable for the agent's act. See *Johnson v. Barber*, 10 Ill. 425 (1849).

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BRENDA DOE, in her own proper person and as next best friend of MICHELLE DOE, Plaintiff, vs. BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS, and BARBARA ULLMAN, Individually and as employees of the Illinois Department of Children and Family Services.	)	No. 85 C 7104

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Booker Bobbitt, Shirley A. Dukes, Devorah Roberts, and Barbara Ullman, individually and as employees of the Illinois Department of Children and Family Services, defendants, appeal to the United States Court of Appeals for the Seventh Circuit from the order entered on behalf of the plaintiff denying the defendants' motion to dismiss on the grounds of qualified immunity. (App.). That order was entered on November 4, 1988. The defendants asks this Court to reverse that order, and enter judgment in the defendants favor.

Dated in Chicago, Illinois this 15th day of November, 1988.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

BY: /s/ Bret A. Rappaport
BRET A. RAPPAPORT
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
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JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 9, 1989.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

BRENDA DOE, in her own proper person and as next best friend of MICHELLE DOE, Plaintiffs-Appellees, No. 88-3225 vs. BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, Individually and as employees of the Illinois Department of Children and Family Services, Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 C 7104 Brian Barnett Duff, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the

same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 88-3225

BRENDA DOE, in her own proper person and as next best friend of MICHELLE DOE,

Plaintiffs-Appellees,

v.

BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, Individually and as employees of the Illinois Department of Children and Family Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 7104 – **Brian Barnett Duff,** *Judge.*

ARGUED JUNE 12, 1989 – DECIDED AUGUST 9, 1989

Before BAUER, *Chief Judge, and* CUMMINGS *and* FLAUM, *Circuit Judges.*

FLAUM, Circuit Judge. The question presented by this interlocutory appeal is whether it was clearly established in 1984 that public officials who place a child at risk of

violence from private individuals in a foster home violate that child's constitutional rights. The district court thought so and therefore denied the defendants' motion for summary judgment on the ground of qualified immunity. The defendants appeal this decision pursuant to *Mitchell v. Forsythe*, 472 U.S. 511 (1985) and we reverse.

I.

The facts of this disturbing case are adequately set forth in the district court's opinion in *Doe v. Bobbitt*, 665 F. Supp. 691 (N.D.Ill. 1987) and need not be repeated in detail. Essentially, this case involves a claim that the defendants violated the child's liberty interest under the due process clause by placing her in the temporary custody of an aunt despite warnings by the child's mother that members of the aunt's household used drugs and had sexually abused children in the past.[1] After being placed in the custody of her aunt, the child was sexually abused on several occasions.

The sole issue on appeal is whether the defendants are entitled to summary judgment on the ground of qualified immunity. Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This standard requires that "the contours of the right must be

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[1] The child had been removed from the custody of her mother by court order due to the mother's alcohol abuse.

sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1986). Thus, while the very act in question need not have been held unlawful, the unlawfulness of the official's conduct must have been apparent in light of preexisting law. *Id.*

The issue in the present case is whether in 1984 an official violated a clearly established constitutional right by placing a child in an environment despite information that individuals in that environment might present a threat to the child's safety.[2] It is conceded that in 1984 there was no Supreme Court decision on this issue. In fact even at present the Supreme Court has not confronted the question. *See DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998, 1006 n.9 (1989). Moreover, no Seventh Circuit precedent has ever recognized such a right.

The absence of a controlling precedent is not fatal to plaintiffs' case. *See Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), *cert. denied*, 109 S.Ct. 497 (1988). In the absence of a binding precedent we will look to all relevant decisional law to determine whether a right has been clearly established. *Id.* In reviewing this authority we endeavor to determine whether at the time the alleged actions took place there was a substantial consensus of opinion that a course of conduct infringed on a right protected by the Constitution.

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[2] The right asserted by the plaintiff is not provided by any Illinois statute.

In the present case, we are unable to conclude that in early 1984 a substantial consensus had been reached that placing a child in a potentially dangerous environment in a foster home was a violation of the due process clause. At that time, only the Second Circuit had held that such a right existed and that case was not directly on point since it involved placement in a licensed foster home on a permanent basis. *See Doe v. New York City Department of Social Services*, 649 F.2d 134 (2nd Cir. 1981).[3] Moreover, the decision in *Doe* depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by either the Supreme Court or the Seventh Circuit. In view of the novelty and paucity of the available authority, we cannot agree with the district court that it was clearly established in 1984 that a public official who places a child at risk of harm from private individuals in a foster home violated that child's constitutional rights. *See Lojuk v. Johnson*, 770 F.2d 619, 631 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986) (one supporting circuit court case, one supporting district court case and several other distantly related cases not sufficient to clearly establish a constitutional right.); *Davis v. Holly*, 835 F.2d 1175, 1182 (6th Cir. 1987) (novel decision from another circuit not sufficient to clearly establish a constitutional right). *Compare Perdue v. Brutsche*, No. 88-2513 slip op. at 8-9 (7th Cir. August 4,

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[3] In *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S.Ct. 1337 (1989), decided well after the events in this case, the Eleventh Circuit joined the Second Circuit in holding that once a state places an individual in a foster home it has a duty to protect that individual from violence by private persons.

1989) (three circuit court decisions in a short period of time sufficient to clearly establish a right). Accordingly, we reverse the district court's decision denying the defendants' motion for summary judgment on the ground of qualified immunity.

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 88-3225

BRENDA DOE, et al,	) Appeal From The United
Plaintiff-Appellee,	) States District Court For
	) The Northern District of
vs.	) Illinois, Eastern Division
BOOKER BOBBITT, et al,	) No. 85 C 7104
Defendant-Appellants	) Hon. Brian Barnett Duff
	) Judge Presiding

NOTICE OF FILING

To: Paula Giroux
Karen Michels Caille
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on August 23, 1989, we filed with the above Court Plaintiff-Appellees' Petition For Rehearing With Suggestion For Rehearing En Banc, a copy of which is hereby served upon you.

/s/ John P. De Rose
John P. De Rose and
Associates

John P. De Rose and Associates
200 South Frontage Road
Suite 304
Burr Ridge, Illinois 60521
(312) 920-1111

PROOF OF SERVICE

The undersigned on oath states that this Notice was served by mailing a copy to the above attorney of record this 23rd day of august, 1989.

/s/ John P. De Rose

SUBSCRIBED AND SWORN to before me this 23rd day of august, 1989.

"OFFICIAL SEAL"
KRISTINE A. PESHEK
Notary Public,
State of Illinois
My Commission
Expires 4/21/93

/s/ Kristine A. Peshek
NOTARY PUBLIC

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 26, 1989.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

BRENDA DOE, in her own proper and as next best friend of MICHELLE DOE, Plaintiffs-Appellees, No. 88-3225 vs. BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, Individually and as employees of the Illinois Department of Children and Family Services, Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 85 C 7104 Brian Barnett Duff, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on August 23, 1989, a vote of the active members of the Court was requested, and a majority* of the

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* Circuit Judges Richard D. Cudahy and Kenneth F. Ripple voted to grant the petition for rehearing *en banc*.

active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BRENDA DOE, in her own proper person and as next best friend of MICHELLE DOE, Plantiffs, vs. BOOKER BOBBITT, SHIRLEY A. DUKES, GARY T. MORGAN, DEVORAH ROBERTS and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services; M. LEONARD GOODMAN individually and as an employee of the Cook County Office of the Guardian Ad Litem; and the COUNTY OF COOK, Defendants.	No. 85 C 07104 Judge Brian Barnett Duff

SECOND AMENDED COMPLAINT

NOW COME the Plaintiffs, Brenda Doe, in her own proper person and as next best friend of Michelle Doe by and through their attorney, John P. DeRose and the Law Firm of John P. DeRose and Associates and complain of the Defendants, Booker Bobbitt, Shirley A. Dukes, Gary T. Morgan, Devorah Roberts and Barbara Ullman, individually and as employees of the Illinois Department of Children and Family Services (hereinafter referred to as "DCFS"); Leonard Goodman, individually and as an employee of the Cook County Office of the Guardian Ad Litem; (hereinafter referred to as "GAL"); and the County of Cook as follows:

I. *TYPE OF PROCEEDING*

1. That this is an action for actual and punitive damages and for injunctive relief to compensate the Plaintiffs because of the actions of the Defendants in violating the rights of the Plaintiffs as protected by the Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

2. That subject matter jurisdiction is vested in the Court pursuant to 42 U.S.C. 1983, 28 U.S.C. 1332, 28 U.S.C. 1343, 28 U.S.C. 2101 and 28 U.S.C. 2102 and in the Court's discretion to exercise jurisdiction over pendant State claims.

3. That venue is conferred upon this Court because the action arose in the Northern District of Illinois and the Plaintiffs and Defendants reside therein.

II. *PARTIES*

4. That Brenda Doe is the natural mother of Michelle Doe.

5. That Michelle Doe, a minor, was eleven (11) years of age when the acts complained of occurred.

6. That Booker T. Bobbitt is an investigator employed by DCFS, Division of Child Protection (hereinafter referred to DCP) and was assigned to investigate the Doe childrens' case on December 15, 1983.

7. That Shirley A. Dukes was the supervisor of Booker Bobbitt and employed by DCFS, Division of Child Protective Services at the time of the investigation conducted by Booker T. Bobbitt.

8. That Gary T. Morgan was the Assistant Deputy Director of the Division of Child Welfare and Protective Services employed by DCFS and was appointed temporary custodian of Michelle Doe on December 21, 1983.

9. That Barbara Ullman was a Child Welfare Administrator employed by DCFS, Division of Child Protective Services and is now a supervisor with DCFS.

10. That Devorah Roberts was a social worker employed by DCFS, Division of Child Protective Services and is now an investigator in the DCP.

11. That M. Leonard Goodman is an employee of GAL in charge of supervision of guardians ad litem appointed in Cook County, Illinois.

12. That Cook County is a local governmental entity organized and existing under the laws of the State of Illinois and maintains, operates and manages an office of the guardian ad litem and specifically employed as its employee and agent the Defendant, M. Leonard Goodman.

III. *FACTUAL ALLEGATIONS*

13. That the Plaintiff, Michelle Doe, who was not delinquent, resided with her mother in North lake, Illinois, when because of her mother's history of alcohol abuse, she was placed by the Juvenile Court under the protective custody and guardianship of Gary T. Morgan, an employee of the Illinois Department of Children and Family Services.

14. That on or about December 16, 1983, the Plaintiff, Brenda Doe, was visited at her home by the Defendant, Booker T. Bobbitt, and at that time she advised Bobbitt that placement of her daughter, Michelle, in the home of Margaret Proctor, the child's aunt, would be detrimental to the mental and physical health and welfare of the child in that alcohol and drugs were abused in the Proctor household, and physical abuse frequently occurred among family members of the Proctor household.

15. That on or about the 18th of December, 1983, the Defendant, Bobbitt went to the home of Margaret Proctor to see Michelle who was then staying at the Proctor residence.

16. That Booker Bobbitts' investigation at that time consisted solely of a brief interview of Michelle, her aunt, Margaret Proctor, Mrs. Proctor's nineteen year old daughter and Michelle's six-year old brother, Ronnie.

17. That based thereon, the Defendant, Bobbitt in total disregard of and without adequate investigation to dispel the objections of Brenda Doe, allowed Margaret Proctor to retain custody of Michelle and Ronnie pending the temporary custody hearing three days later.

18. That during the period of time before the temporary custody hearing took place, the young adult members of the Proctor family had commenced to take sexual liberties with Michelle.

19. That prior to the temporary custody hearing and while in the Juvenile Court Building, Michelle complained to both Booker T. Bobbitt and Devorah Roberts

that she wanted to be removed from the Proctor home although she did not report the sexual assaults upon her.

20. That on the 21st day of December, 1983, a hearing was held in the Circuit Court of Cook County, Juvenile Division, No. 83 J 17307, to determine safe temporary placement of the children, Michelle Doe and her brother, Ronnie.

21. That in a conference immediately preceeding the temporary custody hearing and out of the presence of the Court, Brenda Doe and her attorney, Sandra Burns again objected to the placement of the Doe children in the Proctor home and recited their fears for the safety of the children because of alcohol abuse, drug abuse and physical abuse in that home.

22. That Booker T. Bobbitt, Devorah Roberts and Leo Wiggins, an employee of the GAL were deliberately indifferent to and intentionally and recklessly disregarded these warnings and admonitions of danger.

23. That during the custody hearing it was brought to the attention of the Court, Booker T. Bobbitt, Devorah Roberts, Leo Wiggins, and all others present that the proposed placement of the child in the home of Margaret Proctor would be detrimental to the mental and physical health and welfare of the child because of the presence there of drug and alcohol abuse, repeated fights in the presence of the children, physical abuse of the children, and the fact that one of the male residents of the Proctor residence was arrested and accused of having a sexual affair with a young boy, which incident had actually been handled by the Cook County Circuit Court, Juvenile Division.

24. That during the custody hearing Booker T. Bobbitt admitted he did not know how many rooms or bedrooms were in the residence of Margaret Proctor, and was incorrect as to who and how many people resided at the house. He further stated, "It's not my job to do a social investigation of the house. It's basically to see if the home is save [sic] enough for temporary placement of the children."

25. Notwithstanding his failure to investigate the mother's allegations and the insistence of Michelle Doe that she was uncomfortable in the Proctor home, Booker Bobbitt testified at the temporary placement hearing as to the placement of the Doe children, over the objections of their mother, insisting the children be placed in the Proctor home.

26. That Leo Wiggins, after being informed by Brenda Doe on the record that drugs and alcohol were abused at the Proctor residence, that the family had repeated fights in the presence of the children, and after Margaret Proctor admitted that one of the male residents of the Proctor residence had been accused of having a sexual affair with a young boy, which incident was actually handled by the Cook County Circuit Court, Juvenile Division, failed to pursue and investigate the allegations of Brenda Doe, continually objected to attempts to elicit further information concerning the Proctor residence and insisted the child be placed with the Proctors.

27. That the Plaintiff, Brenda Doe was willing to agree to the temporary custody of her children with the Department of Children and Family Services as long as

they were placed in a proper foster home other than that of Margaret Proctor.

28. That at the custody hearing, the Juvenile Court appointed the Defendant, Gary T. Morgan, as temporary custodian of Michelle and Ronnie and ordered the Defendants to further investigate the Proctor residence for possible placement there.

29. That thereafter, the Plaintiff, Michelle Doe was left in the custody of Margaret Proctor without any further investigations to determine the suitability of the Proctor residence.

30. That during the time that plaintiff, Michelle Doe was in the Proctor residence, she was sexually abused by three (3) different adult males – often by two such males at the same time and in the same room where and while another female juvenile was also subjected to sexual assault.

31. That Michelle made complaint of these sexual assaults to her aunt, Margaret Proctor and other adult members of the Proctor household about which complaints no corrective action was taken.

32. That Michelle's uncle regularly consumed large quantities of alcohol in the presence of DCFS caseworkers who observed him to be intoxicated and who concluded he was an alcoholic abusing alcohol on a continuing basis in the home.

33. That Michelle was given alcohol to consume to the point of intoxication by her uncle and was given marijuana and pills to ingest by her two adult cousins.

34. That Michelle was battered and bruised by her adult cousins and evidence of this bruising was clearly visible to and observed by DCFS caseworkers who still left Michelle in the Proctor home.

35. That Defendants are responsible by statute, Court Order, Illinois and Federal law to provide a minimum level of care equal to that which a good parent should provide.

36. That the Defendants, and each of them, individually and as employees of their respective employers, were bound by Illinois Statute to protect the Plaintiffs' rights as guaranteed under the Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

COUNT I – 1983 Violations

1-36. Plaintiffs repeat and reallege paragraphs 1 through 36 of this complaint as though fully set forth as paragraphs 1 through 36 of Count I.

a. Booker T. Bobbitt and Shirley A. Dukes

37. That Booker T. Bobbitt and Shirley A. Dukes, his supervisor who approved his tardy and woefully inadequate reports, failed to take necessary investigative action specifically required by statute and court order so as to prevent abuses of the plaintiffs rights under the Fifth and Fourteenth Amendments to the United States Constitution in that they:

a. Failed to investigate the Proctor residence and the backgrounds of its occupants to determine whether it would provide a safe and clean setting for Michelle Doe;

b. Failed to investigate complaints and allegations by Brenda Doe concerning alcohol, drug and sexual abuse and the living habits of the occupants of the Proctor residence made both before the custody hearing and repeatedly thereafter as required by Ill. Rev. Stats. Ch. 23, Section 251, et seq.

c. Breached a DCFS policy that no children should be placed in a home, temporarily or otherwise, wherein a sex offender resides.

d. Failed to ascertain the number of people actually living in the Proctor household.

e. Failed to determine where the people living in the Proctor household slept and what specific sleeping accommodations would be provided Michelle and her brother.

f. Failed to speak to Michelle Doe outside of the Proctor residence, and away from the sphere of influence of the Proctors, to determine if she was being abused while at that residence.

g. Failed to submit a Preliminary Report of Investigation (CANTS 2) within the requisite seven days after the receipt of the Initial Oral Report (CANTS 1) on December 15, 1988 thereby effectively delaying any further investigation into the placement of Michelle Doe in the Proctor home by the DCFS's Division of Child Protective Services.

h. Failed to inform the CPS (including both Devorah Roberts and Barbara Ullman) either orally or in writing of the serious allegations of alcohol and drug abuse and the fact that a sex offender lived in the Proctor

household, which allegations were recited more than once by Brenda Doe before, during and after the custody hearing.

38. That Booker T. Bobbitt's and Shirley A. Duke's failure to adequately and properly investigate the Proctor home was a substantial factor leading to the sexual abuse of Michelle Doe by members of the Proctor home.

39. That as a result of Bobbitt's and Duke's deliberate indifference and recklessness, Michelle Doe was repeatedly and regularly sexually abused by her two cousins, ages 20 and 22, and her uncle at least fifteen (15) times beginning on December 20 which was seven (7) days before Booker T. Bobbitt even submitted his CANTS 2 report which he filed late with the approval of Shirley Dukes.

40. That Bobbitt's and Dukes' failure to act properly in this investigation, in that they ignored the warnings of Brenda Doe regarding the inappropriateness of the Proctor household for her daughter, Michelle Doe and the tardiness in submitting the CANTS 2 report resulted in a violation of the plaintiffs' rights under Illinois law and the Fifth and Fourteenth Amendments to the United States Constitution.

b. Gary Morgan

41. That during the time the plaintiff, Michelle Doe was in the Proctor residence where she was sexually abused, the defendant, Gary T. Morgan who was appointed the legal custodian of Michelle Doe, failed to take

necessary ministerial action specifically required by statute and Court Order so as to prevent abuses of plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution in that he:

a. Abused the discretion given him by the Juvenile Court to place Michele Doe in the Proctor residence by failing to conduct an investigation of the Proctor family as specifically required by Court Order and Illinois Statutes.

b. Recklessly disregarded serious warnings that the Proctor household was unsafe.

c. Acquiesced in a practice of poor training and supervision of his subordinates who were responsible for investigating the Proctor household.

42. That Gary T. Morgan's reckless disregard of the allegations by Brenda Doe concerning the alcohol, drug and sexual abuse occurring in the Proctor household was a substantial factor leading to the repeated and regular sexual abuse of Michelle Doe by Members of the Proctor household for nearly every day of the duration of her month and one-half stay at the Proctor residence.

43. That Gary T. Morgan's deliberate indifference to his legal duty as court-appointed guardian of Michelle Doe and reckless failure to supervise, train and/or discipline the other defendants in this cause was a substantial factor leading to the denial of plaintiffs' right under the Fifth and Fourteenth Amendments to the United States Constitution.

c. Barbara Ullman

44. That during the time the plaintiff Michelle Doe was in the Proctor residence where she was sexually abused, the defendant Barbara Ullman, acquiesced in a policy and practice of poor training and supervision of subordinates and failed to carry out her legal duty of providing a minimum level of care equal to which a good parent would provide in that she:

a. Did not adequately or formally instruct the social workers in the CPS under her direct supervision in that there was very little specialized training for these social workers.

b. Permitted Devorah Roberts, a new employee who Barbara Ullman knew was incompetent, to handle the Doe case for approximately one (1) month.

c. Was dissatisfied with Devorah Roberts' inadequate investigation and incoherent presentations of her findings into the suitability of the Proctor residence as a home for Michelle Doe, yet did nothing to assure that the home was safe for Michelle Doe.

d. Recklessly ignored Devorah Roberts warnings regarding the lack of cleanliness, roaches on the food and delapidated condition of the Proctor residence.

e. Was deliberately indifferent to the repeated pleas by Brenda Doe to remove Michelle Doe from the Proctor residence because of alcohol and drug abuse that was present there.

f. Did not immediately try to ascertain the reasons Michelle tearfully expressed her unhappiness in the Proctor home.

g. Recklessly allowed the Doe's case to get to the point where there was total confusion as to where the children should be placed by the time the case was reassigned to the social worker who replaced Devorah Roberts.

45. That as a direct result of Barbara Ullman's deliberate indifference to and reckless disregard of her legal duty to supervise and train the social workers of close-contact with the children assigned to the CPS for care and protection, Michelle Doe was permanently scarred emotionally by the repeated sexual abuse she suffered for over a six (6) week period while in the Proctor residence.

46. That Barbara Ullman's deliberate indifference to the high possibility of serious risk to Michelle in allowing her to remain in the Proctor home for six (6) weeks was a substantial factor in the occurrence of at least fifteen (15) instances of sexual abuse to Michelle Doe by the three (3) male occupants of the Proctor household.

47. That such inaction be Barbara Ullman was a violation of plaintiffs' constitutionally protected rights under the Fifth and Fourteenth Amendments to the United States Constitution.

d. Devorah Roberts

48. That during the one (1) month that Devorah Roberts was assigned to Michelle Doe's case she was incompetent in her investigation of the Proctor home, inattentive to the needs of Michelle Doe, and irresponsible in her work as a social worker in that she:

a. Failed to determine whether the Proctor home was a safe setting for Michelle Doe even though she observed and knew that it was a filthy and chaotic household crawling with cockroaches.

b. Failed to perceive that Mr. Proctor was a chronic alcoholic even though he spent his time at home with a whiskey glass in his hands at all times.

c. Failed to ascertain how many people lived in the Proctor household and the sleeping accommodations for each of them.

d. Took no action in removing Michelle Doe from the Proctor home even though removal of a child from a temporary placement was well within her power as a CPS social worker.

e. Did not organize her investigation of the Proctor home and Michelle Doe's well-being in any coherent fashion so as to properly document the results of her investigation.

49. That Devorah Roberts' deliberate indifference to the obviously inappropriate placement of Michelle in the Proctor household was a substantial factor leading to the repeated and regular sexual abuse of Michelle Doe nearly every day during the month that Devorah Roberts' was assigned to the Doe case.

50. That Devorah Roberts' failure to carry out her duties as a social worker was a violation of the plaintiffs' constitutionally protected rights under the Fifth and Fourteenth Amendments to the United States Constitution.

e. M. Leonard Goodman

51. That M. Leonard Goodman as the supervisor of Assistant Guardian Ad Litems assigned to the Juvenile Courtrooms of Cook County recklessly acquiesced in a policy and practice of poor training and inadequate supervision of his subordinates in that he:

a. Did not adequately or formally instruct Leo Wiggins as to the proper method in which he should represent the minor children he represented.

b. Did not caution Leo Wiggins to heed the warnings of danger that Brenda Doe voiced to him concerning the temporary placement of her children.

c. Did not establish adequate methods of review of the work of Leo Wiggins in order to discover and correct Wiggins indifference to the plight of the Doe children.

52. That M. Leonard Goodman's failure to carry out his duties as the supervisor of Guardian Ad Litems was a violation of the plaintiffs' constitutionally protected rights under the Fifth and Fourteenth Amendments to the United States Constitution.

f. All Defendants

53. That the Defendants, and each of them, were repeatedly forewarned and knew of the great risk and high probability that the Plaintiff, Michelle Doe would be subject to abuse in the Proctor residence.

54. That the aforementioned acts and omissions of the Defendants, and each of them, amounted to deliberate indifference in the performance of a ministerial act

required to be performed by statute, Court Order and the United States Constitution.

55. That the Defendants, and each of them, exhibited reckless disregard and deliberate indifference to Plaintiffs' welfare and to a known risk, a known injury and specific duties mandated by law.

56. That as a direct and proximate cause of the wrongful acts and omissions of the Defendants as well as other unknown persons, the Plaintiffs, Brenda and Michelle Doe suffered deprivations of their rights under the Fifth, Ninth and Fourteenth Amendments of the United States Constitution in that they were denied due process and equal protection under the law for persons similarly situated.

57. That the Plaintiffs' right to family privacy without state interference was violated by the Defendants' failure to provide the requisite level of care for the Plaintiff, Michelle Doe.

WHEREFORE, the Plaintiffs, Michelle Doe and Brenda Doe, pray this Court will grant the following relief:

a. Award the Plaintiffs damages in excess of One Million ($1,000,000.00) Dollars;

b. Grant the Plaintiffs such other and further relief as this Court deems fit and appropriate, including reasonable attorney's fees and costs of this suit.

COUNT II – BATTERY

1-36. Plaintiffs repeat and reallege Paragraphs 1 through 36 of this Complaint as and for Paragraphs 1 through 36 of Count II as though fully set forth herein.

37. That the acts and omissions of the Defendants and each of them respectively amounted to deliberate indifference and recklessness in the performance of a ministerial act, and they knew or should have known that such recklessness could result in the Plaintiff, Michelle Doe being battered.

38. That as a direct and proximate cause of the wrongful acts and omissions of the Defendants and each of them, the Plaintiff, Michelle Doe was battered while at the Proctor residence in violation of Illinois law.

WHEREFORE, the Plaintiffs, Michelle Doe and Brenda Doe, pray this Court will grant the following relief:

a. Award the Plaintiffs damages in excess of One Million ($1,000,000.00) Dollars; and

b. Grant the Plaintiffs such other and further relief as this Court deems fit and appropriate, including reasonable attorney's fees and costs of this suit.

COUNT III

Intentional Infliction of Emotional Distress

1-36. Plaintiffs repeat and reallege Paragraphs 1 through 36 of this Complaint as and for Paragraphs 1 through 36 of Count III as though fully set forth herein.

37. That the conduct of the Defendants in cursorily investigating or failing to investigate at all the home and family of the Proctor residence into which they placed the Doe children and the failure of the Defendants to heed or investigate the serious complaints of Brenda Doe concerning that residence and its occupants was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency.

38. That as a result of the intentional and negligent actions of the Defendants and each of them, the Plaintiffs were caused to suffer severe, extreme and repeated emotional distress in that:

a. the minor child, Michelle, was subjected to regular and repeated batteries in the form of sexual molestation by members of the home into which she was placed;

b. the minor child, Michelle was given large quantities of alcohol to consume to the point of intoxication and marijuana and drugs to ingest;

c. the minor child, Michelle was physically battered and bruised by the young adult members of the Proctor family for refusing to submit to their sexual advances;

d. the mother, Brenda, was ignored as she complained of the drug, alcohol, physical and sexual abuses practiced by members of the home into which her children were placed;

e. the minor child has been forced to seek medical help and counseling as a result of the emotional strain and circumstances of her ordeal; and,

f. the mother, Brenda, has been forced to seek counseling as a result of her ordeal upon learning of the plight of her child.

39. That as a result of the intentional and reckless actions of the Defendants, and of each of them, the Plaintiffs have been emotionally injured and distressed causing them to seek professional medical help.

WHEREFORE, the Plaintiffs pray this Court will grant the following relief:

a. Award the Plaintiffs damages in excess of One Million ($1,000,000.00) Dollars; and

b. Grant the Plaintiffs such other and further relief as this Court deems fair and proper, including reasonable attorney's fees and the costs of this suit.

Respectfully submitted,

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No. 89-1218

APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

BRENDA DOE, as next best friend of MICHELLE DOE, a minor,

Petitioner,

v.

BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOBBITT, DUKES, ROBERTS and ULLMAN

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QUESTION PRESENTED

Whether, in 1984, the law clearly established that the State's removal of a child from an abusive parent and its temporary placement of the child in the physical custody of relatives made state officials liable for any harm that might come to the child at the hands of the relatives.

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No. 89-1218

In The

Supreme Court of the United States

October Term, 1989

BRENDA DOE, as next best friend of MICHELLE DOE, a minor,

Petitioner,

v.

BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOBBITT, DUKES, ROBERTS and ULLMAN

The respondents, Booker Bobbitt, Shirley Dukes, Devorah Roberts and Barbara Ullman, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion in this case. The opinion is reported at 881 F.2d 510 (7th Cir. 1989).

STATEMENT OF THE CASE[1]

Sometime in late 1983, Michelle Doe, age eleven, and Ronnie Doe, age six, were removed from their mother's (Brenda Doe's) home by the Juvenile Court because of Brenda's alcohol abuse. (A.30-31). The children were placed under the guardianship and protective custody of the Department of Children and Family Services ("DCFS") and temporarily moved to their aunt's (Margaret Proctor's) home. (A.31-32).

On December 16, 1983, Booker T. Bobbitt, an investigator with the Division of Child Protective Services (who was assigned to Michelle's case), visited Brenda in her home. (A.30-32). Brenda told Bobbitt that Michelle would not be safe if she remained in her aunt's home. (A.32). Brenda told Bobbitt that residents of the Proctor household abused drugs and alcohol, and that physical abuse frequently occurred among family members. (*Id.*).

On December 18, 1983, Bobbitt visited Michelle at her aunt's residence and spoke briefly with Michelle, her

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[1] References to the record will cite to the Appendix of Doe's petition when possible and will be indicated as (A. ___). Otherwise references will be made to the documents in the record before the United States Court of Appeals for the Seventh Circuit and will be indicated as (R.Doc. at p. ___).

This case was before the district court on a motion to dismiss the second amended complaint; therefore the facts alleged in the complaint are accepted as true. However, the record does not contain documentation or testimony supporting several factual statements included in petitioner's statement of the case. These unsupported statements are set forth in the Appendix herein.

aunt, Mrs. Proctor's nineteen-year-old daughter and Michelle's brother, Ronnie. (*Id.*). Based on these interviews, Bobbitt allowed Margaret Proctor to retain custody of Michelle and Ronnie pending the temporary custody hearing three days later. (*Id.*).

The custody hearing to determine Michelle's temporary placement took place on December 21, 1983 in the Circuit Court of Cook County, Illinois, Juvenile Division. (A.33). While in the Juvenile Court Building, Michelle complained to Booker Bobbitt and Devorah Roberts, a social worker employed by DCFS, Division of Child Protective Services, that she wanted to be removed from her aunt's home. (A.32-33). Michelle did not mention any sexual assaults upon her. (*Id.*).

At the temporary custody hearing, Brenda testified that drugs and alcohol were abused at the Proctor residence, that the family had repeated fights in the presence of the children, and that one of the male residents of the household had been accused of having a sexual affair with a young boy. (A.33).

Bobbitt testified that he had not conducted a detailed investigation of the Proctor household. (A.34). He explained that it was not his job to do a social investigation of the house, but rather to see if the home was safe enough for temporary placement of the children. (*Id.*). Bobbitt recommended Michelle's placement with her aunt as did Leo Wiggins, an employee of the Cook County Office of the Guardian Ad Litem appointed to represent Michelle's interests. (A.34).

At the conclusion of the hearing, the Juvenile Court appointed DCFS as temporary custodian of Michelle,

with permission to temporarily place Michelle with her aunt, and ordered further investigation of the Proctor residence for continuing placement. (A.35; R.Doc.45, Exhibit D, Report of Proceedings December 21, 1983 at p. 51). Accordingly, Michelle left the hearing in the custody of Margaret Proctor. (A.35). Thereafter, she became the victim of repeated sexual abuse by male members of the Proctor household. (A.35). The sexual abuse of Michelle was not reported or discovered through investigation until after Michelle was placed in a licensed foster home six weeks later. (R.Doc.29 at p. 6; A.41). Michelle sued for damages under 42 U.S.C. §1983. The second amended complaint alleged that respondents ignored Brenda Doe's warnings that the Proctor household was unsuitable and recklessly allowed Michelle to remain in her aunt's home, in violation of her substantive due process liberty interest. (A.29-44).[2]

The district court rejected respondents' motion to dismiss Michelle's §1983 claim on the grounds of qualified immunity, finding that the right Michelle claimed was clearly established in 1984, citing *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979). (A.14). Treating respondents' motion to dismiss as a motion for summary judgment, the Seventh Circuit reviewed all relevant decisional law and determined that in 1984, it had not been clearly established that placing a child in a potentially dangerous

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[2] Michelle's second amended complaint also contained claims under Illinois law for battery and intentional infliction of emotional distress. (A.45-47). The district court dismissed these claims against all defendants finding defendants absolutely immune from liability. (A.15).

environment in a relative's home was a violation of due process. (A.22-23). Accordingly, the court reversed the district court's decision denying respondents' motion to dismiss on the ground of qualified immunity. (A.24).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT USED THE PROPER STANDARDS IN AWARDING QUALIFIED IMMUNITY TO THE RESPONDENTS.

This Court has made clear that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness of the action', assessed in light of the legal rules that were 'clearly established' at the time the action was taken." *Anderson v. Creighton*, 488 U.S. 635, 107 S.Ct. 3034, 3038 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed 2d 496 (1982)). In *Anderson v. Creighton*, this Court elaborated on the level of generality at which legal rights are "clearly established." This Court made clear that for a right to be clearly established it must have been articulated with a significant degree of particularity:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

107 S.Ct. at 3039.

In determining that respondents were entitled to qualified immunity in the instant case, the Seventh Circuit premised its qualified immunity analysis on the question of whether it was clearly established in 1984 that public officials who place a child at risk of violence from private individuals in a foster home violate that child's constitutional rights. *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989). (A.20-21).

Petitioner contends that the Seventh Circuit misapplied the applicable standard for determining the issue of qualified immunity by imposing an impermissibly narrow characterization of the right which Michelle alleges her DCFS caseworkers violated. (Petition, p. 11). By phrasing the right in question in such restrictive terms, petitioner argues, the court was able to avoid considering substantial case law in analogous areas, case law holding that a person in the custody and control of state officials has the right not to be placed at risk of a known danger by those charged with her care.[3] (Petition, p. 12).

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[3] Contrary to petitioner's implication that the Seventh Circuit did not consider the "analogous" case law cited in its petition, those cases were briefed before the court. Moreover, the Seventh Circuit referred to *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S.Ct. 1337 (1989) which included an extensive discussion of *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Doe v. Bobbitt*, 881 F.2d 510, 512 n.3 (7th Cir. 1989). (A.23). Likewise, the Seventh Circuit cited *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986), which expressly rejected both *Youngberg v. Romeo*, and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) as controlling precedent for purposes of showing clearly established law under the qualified immunity doctrine for the due process claim arising out of Lojuk's therapy. *Doe v. Bobbitt*, 881 F.2d at 512. (A.23).

Petitioner urges the adoption of a broader construction of the right asserted by Michelle, that is a general affirmative right to protection for persons in the custody and control of state officials. (Petition, pp. 14-16).

Petitioner's proposal for a broader definition of Michelle's right which would ostensibly be covered by the cases cited in her brief (Petition, pp. 12-15), is contrary to the qualified immunity analysis established by this Court requiring specificity and particularity in defining the right. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987). The definition suggested by petitioner fails to particularize the nature of the custody and control in this case: temporary placement of a child in the physical custody and control of private actors (her relatives) at whose hands she suffered abuse. Consequently, as will be shown in the following argument, the case law upon which petitioner relies does not define "[t]he contours of the right" alleged by Michelle with sufficient clarity "that a reasonable official would understand that what he [wa]s doing violate[d] that right." *Anderson v. Creighton*, 107 S.Ct. at 3039.

Accordingly, the Seventh Circuit properly applied this Court's rulings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 438 U.S. 635 (1987), in finding that respondents were entitled to qualified immunity.

II. THE SEVENTH CIRCUIT'S DECISION IN AWARDING QUALIFIED IMMUNITY DOES NOT CONFLICT WITH ANY DECISIONS IN OTHER FEDERAL CIRCUITS.

The only issue in this case is whether it was clearly established in early 1984 that public officials who place a

child at risk of violence from private individuals in a foster home violate that child's constitutional rights.[4] Accordingly, a qualified immunity analysis is limited to pre-1984 case law. Yet, with the exception of *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) and *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979), all of the cases cited by petitioner in support of her contention that the Seventh Circuit's decision awarding qualified immunity to respondents is in conflict with other circuits were decided after 1984.

Moreover, six of the nine cases cited by petitioner, including *Doe v. New York City Department of Social Services* and *Brooks*, are not qualified immunity cases. (*Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979); *Doe v. New York City Department of Social Services*, 670 F. Supp 1145 (S.D.N.Y. 1987); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S.Ct. 1337 (1989); *Lipscomb by and through DeFehr v. Simmons*, 884 F.2d 1242 (9th Cir. 1989); and *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986)). Rather, these cases involved the substantive issue of whether such a constitutional duty existed at all. Furthermore, none of the cases addressed the State's alleged affirmative duty of protection in terms of the circumstances of the case at bar: the State's emergency

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[4] Because it concluded that the state respondents were entitled to qualified immunity from petitioner's action for damages, the Seventh Circuit did not consider the substantive claim of a deprivation of her constitutional rights by the respondents.

removal of Michelle and her brother from the custody of their abusive mother, and the temporary placement of the children in the home of their aunt (who was not an agent of the State and whose home was not a licensed foster care facility), where the abuse Michelle sustained resulted at the hands of private actors.

Of the three cases petitioner cites which do address qualified immunity, petitioner misrepresents the holding in *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 816 (1989). The Fourth Circuit in *L.J.* did not hold that "at least after 1980, the date of the *Martinez* decision, [t]here existed a constitutional right to protection on the part of children in state custody or having a 'special relationship' with the State . . . " (Petition p. 20). The holding which petitioner cites is that of the district court, which based its denial of qualified immunity on two different theories, constitutional and statutory. The Fourth Circuit affirmed the district court's denial of qualified immunity, but only on the statutory theory. *Id.* at 122. The court stated: "Our conclusion makes it unnecessary to decide whether plaintiffs' constitutional rights were also violated prior to 1980 . . . ." *Id.*

The remaining two cases cited by petitioner addressing qualified immunity are related cases dealing with sexual abuse of two female students by the same teacher. *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988), *vacated and remanded for further consideration in light of DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998 (1989), *affirmed on different grounds*, 882 F.2d 720 (3rd Cir. 1989); *Sowers v. Bradford Area School District*, 694 F.Supp. 125 (W.D. Penn. 1988), *affirmed* 869

F.2d 591 (3rd Cir. 1988), *vacated and remanded for further consideration in light of DeShaney*, 109 S.Ct. 1634, *affirmed on remand*, 887 F.2d 262 (3rd Cir. 1989). In both cases, the judgment of the Third Circuit finding that plaintiffs had stated a cause of action under §1983 was vacated by the United States Supreme Court and remanded for further consideration in light of *DeShaney v. Winnebago County of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989).[5]

On remand, the court in *Stoneking* affirmed its finding that plaintiff had a viable §1983 claim, but on grounds other than that school officials had an affirmative duty to protect students from harm perpetrated by a teacher. Relying on *Ingraham v. Wright*, 430 U.S. 651 (1977) (due process right to be free from corporal punishment in schools), the court stated that a student's right to be free from a teacher's sexual molestation was clearly established. Id. 726-727. Unlike *Stoneking*, in the instant case there was no clearly established law in 1984 to put respondents on notice that their conduct violated Michelle's substantive due process rights. Even the court in *Stoneking* recognized the uncertainty of the law regarding an affirmative duty of state officials to protect children in foster homes. *Id.* at 724.

In attempting to meet her burden as required by this Court in *Davis v. Scherer*, 468 U.S. 183, 197 (1984),

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[5] Only the Third Circuit's decision in *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Dist. 1989) is a published decision, so respondents' discussion will be limited to *Stoneking*. Presumably *Stoneking* and *Sowers* were affirmed on the same grounds since the relevant allegations in the complaints were identical.

petitioner cites only two cases in the foster care context as support for her contention that in 1984 she was entitled to an affirmative right to protection: *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983), and *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979). (Petition, pp. 15-16, 18). Neither case is representative of the circumstances in the case at bar. The Seventh Circuit rejected *Doe v. New York City Department of Social Services* as valid authority, finding it not directly on point since it involved placement in a licensed foster home on a permanent basis, whereas the instant case involved placement with Michelle's aunt, (whose home had not been licensed as a foster home), on a temporary basis. (A.23). Moreover, the Seventh Circuit noted that the decision in *Doe v. New York City Department of Social Services* depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by this Court. *Id.*[6] *Brooks v. Richardson, supra*, is distinguishable on similar grounds.

In light of the dearth of authority establishing as of 1984 that the State had an affirmative obligation to protect the children it placed in foster care, petitioner proposes that respondents should have known their actions violated her constitutional rights from "analogous" case law in existence at the time.[7] (Petition, pp. 12-15). These

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[6] *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006 n.9 (1989).

[7] Four of the cases cited by petitioner were decided after the events in this case and were therefore not available

(Continued on following page)

cases recognize the right to protection for those persons in the physical custody and control of state officials; specifically prison inmates in *Estelle v. Gamble*, 429 U.S. 97 (1976) and involuntarily committed patients in *Youngberg v. Romeo*, 457 U.S. 307 (1982).[8] The rationale underlying the affirmative duties imposed in *Youngberg* and *Estelle* is that by taking an individual into custody, the State renders him unable to care for himself. *Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2458-59. This helplessness arises because the State has removed and isolated the individual from the community and placed him under direct control of the institutional authorities. *Id.*

By contrast, a child placed in foster care is not in custody in the sense of *Youngberg* and *Estelle*. In an opinion written for this Court by Justice Powell just twelve days after he wrote on behalf of the Court in *Youngberg v. Romeo*, this Court held that foster children are not in the

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authority at the time this action arose: *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985); *Garrett v. Rader*, 831 F.2d 202 (10th Cir. 1987); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 1338 (1989). (Petition, pp. 12-14).

[8] Petitioner also cites *Martinez v. State of California*, 444 U.S. 277 (1980) as intimating that an affirmative right to protection under the Fourteenth Amendment could arise outside the prison context under conditions where state officials were aware that their actions caused an identifiable person to be placed at risk of harm from a third party. (Petition, p. 13). Language suggesting this possibility was noted by this Court to be dicta in the *Martinez* holding. *DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998, 1004 n.4 (1989).

custody of the State. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510-11 (1982). Justice Powell stated that a foster child is in a wholly different position than an incarcerated prisoner or an institutionalized patient. In particular, the Court ruled that children placed in foster homes "are not in the 'custody' of the State." *Id.* at 510. The Court in *Lehman* concluded that foster care was not sufficiently analogous to incarceration or institutionalization to give rise to constitutional obligations under the habeas clause.

Thus, based on the inherent differences in incarceration/involuntary institutionalization and placement in foster care, it cannot be said that the analogous case law cited by petitioner "clearly established" during the relevant period an affirmative right to protection for persons placed in foster care by state officials.

Included in petitioner's argument that the Seventh Circuit's decision in granting qualified immunity conflicts with the decisions of several other federal circuits is a reference to this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, ___ U.S.___, 109 S.Ct. 998 (1989), and the area left open in *DeShaney*: whether an affirmative duty to protect analogous to that connected with incarceration or institutionalization would have arisen if the State had removed Joshua from free society and placed him in a foster home operated by its agents. *Id.*, 109 S.Ct. at 1006 n.9. (Petition, pp. 17-18, 22-23). Petitioner states that several federal circuits have recently rendered decisions which fall into the area left open by *DeShaney* and that a number of these cases have

refused to grant qualified immunity to officials responsible for placing or maintaining a child in an abusive environment.[9] (Petition, p. 18).

First of all *DeShaney* was decided five years after the events in this case took place. Thus, *DeShaney* cannot be relied upon by petitioner in a qualified immunity analysis of whether the law was clearly established in 1984. Moreover, there would be no need to consider the question left open by *DeShaney*, because the circumstances of this case fall within the *DeShaney* holding. In *DeShaney*, this Court held that respondents' failure to provide petitioner with adequate protection against his father's violence did not violate his rights under the substantive component of the Due Process Clause. *Id.* at 1003. The Court explained that a State's failure to protect an individual against private violence generally did not constitute a violation of the Due Process Clause because the Due Process Clause imposed no duty on the State to provide members of the general public with adequate protective services. *Id.* at 1002-1004. Like *DeShaney*, petitioner was in the physical custody of a private party, her aunt, who was in no sense a state actor.[10] She was not placed in a foster care facility

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[9] As previously established herein, petitioner has cited no cases denying qualified immunity arising out of allegations of physical or sexual abuse in the foster care context. Yet the following recent Court of Appeals cases did grant immunity, qualified or absolute, under such circumstances: *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989); *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989).

[10] See: *Milburn v. Anne Arundel County Dept. of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 148

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run by state agents, nor was she placed with a family in a licensed foster home. Hence, petitioner does not fall into the area left open by the *DeShaney* decision.[11] For these reasons, discussion of the *DeShaney* case is irrelevant to petitioner's argument.

Thus, as demonstrated herein, the Seventh Circuit's decision to grant qualified immunity to respondents does not conflict with any decision in the other circuits.

(Continued from previous page)

(1989) (foster parents were not state actors for purposes of §1983 suit brought by foster child for alleged acts of child abuse where State exercised no coercive power over foster parents).

[11] Petitioner also claims that the Seventh Circuit has misread the rule of *DeShaney* to mean that no child has an affirmative right to protection whether she is in the custody of her natural parents, or in the custody or under the control of state officials. (Petition, p. 22). The Seventh Circuit only cited *DeShaney* in passing to indicate that not only was there no Supreme Court case in 1984 on the issue in this case, but also that the issue has not been confronted by this Court to date. (A.22).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The record does not contain documentation or testimony supporting the following statements included in petitioner's statement of the case:

Page 5, Paragraph 2, last sentence:
"Bobbitt did not give the children an emergency phone number, or any other method of contacting him."

Page 6, Paragraph 1, sentences 2 and 3:
"Both Daniel and Ronald were involved, subjecting Michelle and their sister, Margaret, to genital, oral and anal intercourse, and lewd fondling. Michelle's uncle kissed and fondled her in an inappropriate manner on other occasions during this period."

Page 7, Paragraph 1, last three sentences:
"After a month of ignoring Roberts's observations, Ullman advised Roberts that the children would remain in the aunt's and uncle's home at least until the next scheduled court date, on February 23, 1984. Ullman finally told Roberts to quit or she would be fired. Roberts quit."

Page 8, Paragraph 1, sentences 1, 2 and 4:
"On January 26, 1984, after Roberts quit, Michelle's case was assigned to yet another caseworker, Bruce Monroe. After approximately six visits with Michelle over the course of two weeks, Monroe exercised his professional discretion and had Michelle removed from her aunt's and uncle's home. . . . Her uncle and cousins were arrested."

Page 8, Paragraph 2:
"In the Circuit Court of Cook County, Illinois, Criminal Division, Michelle's uncle and cousins pled guilty to various felony charges stemming from the sexual attacks on Michelle. Her uncle was put on probation. The cousins, Daniel and Ronald, were sent to prison."